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84-194
No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

LOUISE SHEARER, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF VERNON SHEARER, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the survivor of a serviceman who was murdered by another serviceman, while both were off duty and off base, may sue the government for damages under the Federal Tort Claims Act even though the Act bars "[a]ny claim arising out of assault [or] battery."

2. Whether such a suit, alleging that the negligence of the servicemen's superior officers was responsible for the murder, is precluded by the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), which bars suits by servicemen for alleged torts incident to military service.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 723 F.2d 1102. The statements on denial of rehearing (App., *infra*, 33a-36a) are reported at 729 F.2d 266. The opinion of the district court (App., *infra*, 24a-29a) is reported at 576 F. Supp. 672.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 31a-32a) was entered on December 19, 1983. A petition for rehearing was denied on March 7, 1984 (App., *infra*, 33a-36a). On June 4, 1984, Justice Brennan ex-

tended the time for filing a petition for a writ of certiorari to August 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671-2680], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2680 provides in part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

STATEMENT

1. Respondent is the mother and administratrix of a serviceman, Private Shearer, who was stationed at Fort Bliss, Texas. While Shearer was on authorized leave and off the base, he was kidnapped and murdered by another serviceman, Heard, who was also stationed at Fort Bliss and was also off duty at the time. This crime occurred in Otero County, New Mexico, which is adjacent to Fort Bliss. App., *infra*, 2a-3a; C.A. App. 5a, 22a. Heard was subsequently convicted of murder in a New Mexico state court and sentenced to a term of 15 to 55 years' imprisonment (C.A. App. 16a).

Respondent subsequently brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, seeking damages from the United States. She claimed that the Army's negligent failure to prevent Heard from murdering Shearer was responsible for Shearer's death. Specifically, respondent alleged (C.A. App. 17a-18a; Complaint paras. 40-41):[1]

> 40. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, or take any action to prevent him from endangering other persons, in spite of the defendant's knowledge of his dangerous and murderous propensities, and further failed to warn other persons that he was at large, and of the danger which he presented.
>
> 41. The United States Government, acting through its Department of the Army, * * * negligently and carelessly failed to then remove Andrew Heard from active military duty, in spite of its knowledge

[1] "Complaint" refers to the Proposed Amended Complaint (C.A. App. 11a-18a). "C.A. App." refers to the Appendix to Appellant's Brief in the court of appeals.

> of his dangerous and murderous propensities, with a reasonable degree of promptness given the great danger potential that he posed to other active duty service members, including [Shearer], none of whom were warned of the dangers posed.

Respondent asserted that in 1977, while Heard was assigned to an Army base in Germany, he was convicted by a German court of manslaughter and sentenced to a four-year prison term. In February 1979, when German authorities granted Heard an early release from that term, the Army promptly removed him from Germany and transferred him to Fort Bliss. By the time Heard killed Shearer, in June 1979, the Army had initiated proceedings to have Heard discharged. C.A. App. 13a-15a.

2. The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the government (App., *infra*, 24a-30a). The district court did not address the government's contention that respondent's claim is barred by 28 U.S.C. 2680(h), the intentional tort exception to the FTCA, which provides in part that the government is not liable for "[a]ny claim arising out of assault [or] battery * * *."[2] See App., *infra*, 29a n.4. Instead, the court held that respondent's claim is precluded by *Feres* v. *United States*, 340 U.S. 135 (1950), which held that a serviceman may not sue the government under the FTCA for alleged torts incident to military service.

The district court stated that under *Feres*, the "question is not whether decedent was engaged in activity incident to military service when he incurred his injuries. Rather, the 'focus . . . is upon when and how the negligent act occurs'" (App., *infra*, 26a (citation and emphasis omitted)). The court reasoned that because respondent "allege[d] that the Army was negligent in failing to exert reasonable control over" Heard, respondent's claims "relate directly to decisions of military personnel made in the course of the performance of their military duty and, therefore, are barred by *Feres*" (*ibid.*). The district court also noted that respondent is entitled to receive veterans' benefits (*id.* at 29a) and explained that "the existence of a no fault compensation scheme" for servicemen, veterans, and their survivors is another reason to apply the *Feres* doctrine (App., *infra*, 28a-29a, citing *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977), and *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 464-465 (1980)).

3. A divided panel of the court of appeals reversed (App., *infra*, 1a-23a). The majority overturned the district court's ruling that *Feres* bars respondent's claim, explaining that "[g]enerally, an off-duty serviceman not on the military base and not engaged in military activity at the time of injury, can recover under FTCA" (App., *infra*, 5a-6a) and that "being kidnapped off base at gun point can never be perceived as one of the activities or anticipated * * * benefits of being in the armed services" (*id.* at 7a (emphasis omitted)).

The court also held that the intentional tort exception to the FTCA does not bar respondent's claim. The majority noted that respondent's complaint alleged that the government was negligent and reasoned that "if an assault and battery occurred as a 'natural result' of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA" (App., *infra*, 8a).

Judge Garth dissented (App., *infra*, 10a-23a). He noted his disagreement with the majority on the *Feres*

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[2] A proviso to the intentional tort exception specifies that the government can be sued for assault, battery, and certain other intentional torts committed by "investigative or law enforcement officers." There is no suggestion that any of the government employees whose actions are at issue in this case were investigative or law enforcement officers.

issue (App., *infra*, 11a & n.1) but principally discussed the intentional tort exception. Judge Garth noted that Section 2680(h) applies to claims "arising out of" assault or battery and not just claims "for" assault or battery (see App., *infra*, 13a-14a) and accordingly, by its terms, precludes respondent's claim. Judge Garth also stated that respondent's claim, "although appearing on the surface to charge negligence is, in truth, no more than a complaint seeking monetary recovery for an assault and battery" (*id.* at 11a).

Judge Garth remarked that "'negligence' claims such as [respondent] asserts have been filed with greater and greater frequency" (App., *infra*, 12a), and he observed that "[b]y far the greater number of courts that have dealt with claims similar to this one have found section 2680(h) to bar liability" (*id.* at 14a). Judge Garth stated that, in particular, the majority erred by not following *Naisbitt* v. *United States*, 611 F.2d 1350 (10th Cir.), cert. denied, 449 U.S. 885 (1980); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981), aff'g *Hughes* v. *Sullivan*, 514 F. Supp. 667 (E.D. Va. 1980); and *United States* v. *Shively*, 345 F.2d 294 (5th Cir. 1965).

The court of appeals denied rehearing en banc by a vote of 6-4 (App., *infra*, 33a-36a). Judge Garth wrote a dissenting statement in which he noted that "all of the other Courts of Appeals which have considered the issue presented here have held that [Section] 2680(h) bars recovery of claims similar to [respondent's]" (*id.* at 34a). Judge Adams, in his dissenting statement, urged that rehearing be granted for the following reasons (*id.* at 35a (citations omitted)):

> [T]he majority opinion in this case decides two questions of exceptional importance that deserve *in banc* consideration. The panel's affirmative answer to the first question, whether the intentional tort exception to the Federal Torts Claims Act, 28 U.S.C. 2680(h), allows a claim against the government for a murder committed by an off-duty serviceman, brings this Court into conflict with the law of several other Circuits. The panel's negative answer to the second question, whether the *Feres* doctrine precludes the kind of litigation that underlies this appeal, raises serious policy concerns about judicial review of military decisions.

REASONS FOR GRANTING THE PETITION

The court of appeals' holding that the intentional tort exception does not bar respondent's claim is inconsistent with the language and the manifest purposes of that provision and conflicts with the decisions of every other court of appeals that has considered the issue. In addition, the court of appeals' approach, if it were to prevail, would be likely to precipitate frequent FTCA actions alleging that the government's negligence was responsible for a crime committed off duty by one of the government's several million servicemen or civilian employees, and would hold the government liable whenever it was found not to have adequately supervised the off-duty activities of one of its employees—an expansive and burdensome liability that is not imposed on ordinary employers by the common law.

The court of appeals' holding that the *Feres* doctrine does not bar respondent's claim is also in error and would require courts to second-guess military officers' decisions about the discipline, morale, control, and discharge of servicemen. Further review is therefore warranted.

1. a. The court of appeals' principal holding—that the intentional tort exception of the FTCA, 28 U.S.C. 2680(h), does not bar respondent's claim—conflicts with the decisions of every other court of appeals that has considered this issue. In *Naisbitt* v. *United States*, 611 F.2d 1350, cert. denied, 449 U.S. 885 (1980), the Tenth Circuit refused to entertain a claim indistinguishable from respondent's: the victims of crimes committed off

the base by two off-duty servicemen, which had resulted in the death of three persons and serious injury to two others, brought suit under the FTCA, alleging that "the United States was guilty of actionable negligence in failing to supervise and curtail the two airmen in question" (*id.* at 1351). The court of appeals held that the claim was barred by the intentional tort exception (*id.* at 1353-1356), remarking that "[t]here is a dearth of authority" to the contrary (*id.* at 1356). The Tenth Circuit has recently reaffirmed this holding. *Wine* v. *United States*, 705 F.2d 366 (1983).

In *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981), aff'g *Hughes* v. *Sullivan*, 514 F. Supp. 667 (E.D. Va. 1980), the complaint charged that a postman on his delivery route took indecent sexual liberties with two minors and that the government had "acted negligently in failing to relieve [the postman] of his delivery duties" after a previous, similar incident (662 F.2d at 220). The court of appeals held that "the claims, although framed in terms of negligence, actually arose out of the assaults and batteries committed by [the employee]. * * * [G]overnment liability was thereby precluded under 28 U.S.C. § 2680(h)." 662 F.2d at 220. The district judge, whose reasoning was adopted by the court of appeals (*ibid.*), relied in part on *Naisbitt*. See 514 F. Supp. at 668.

Finally, in *United States* v. *Shively*, 345 F.2d 294 (5th Cir. 1965), a person who was shot and injured by a serviceman sued under the FTCA, claiming that the Army negligently issued a pistol to the serviceman even though it had reason to know that he would use it to assault the plaintiff. The court of appeals, reversing a judgment in favor of the plaintiff, stated that the plaintiff's claim "is a 'claim arising out of assault,' which is, in those words, specifically excepted from recovery under the Federal Tort Claims Act, 28 U.S.C. § 2680(h)." *Id.* at 297.

The court below attempted to distinguish *Naisbitt* on the ground that the "complaint [in *Naisbitt*] failed to assert any facts" substantiating the allegation of negligence (App., *infra*, 10a). The court of appeals did not expressly distinguish *Hughes* and *Shively*, although it suggested that those cases also involved "artful pleadings with conclusionary allegations" (App., *infra*, 8a). There is no basis for these distinctions. Nothing in the opinions in *Naisbitt* or *Wine*—both of which affirmed the dismissal of complaints—suggests that the Tenth Circuit was concerned that the pleadings lacked factual substantiation; those decisions make it entirely clear that the Tenth Circuit will not entertain claims like respondent's, however they are pled. In *Hughes*, the opinions themselves recite facts that would support an allegation of negligence at least as well as the facts asserted by respondent (see 662 F.2d at 220; 514 F. Supp. at 667-668). *Shively* reversed a judgment in favor of the plaintiff, and the court of appeals expressly agreed with the district court's finding that the government was negligent (345 F.2d at 296).

b. The court of appeals' decision is also inconsistent with the language and the purposes of the intentional tort exception. Section 2680(h) bars "[a]ny claim *arising out of* assault [or] battery" (emphasis added). As Judge Garth noted in his dissent, "'Congress could easily have excepted claims *for* assault. It did not; it used the broader language excepting claims *arising out of* assault.'" App., *infra*, 14a, quoting *Collins* v. *United States*, 259 F. Supp. 363, 364 (E.D. Pa. 1966). Respondent's claim "arises out of" an assault and battery within the plain meaning of that term. This Court has recently interpreted another FTCA exception that is similarly phased according to its literal meaning. *Kosak* v. *United States*, No. 82-618 (Mar. 21, 1984), slip op. 5-7. The court of appeals erred in not inter-

preting Section 2680(h) according to its plain meaning and affirming the dismissal of respondent's claim.

Moreover, a central purpose of Section 2680(h) is, indisputably, to exempt the government from liability for the intentional torts of its employees when they are acting *within* the scope of their employment. It is evident that a claimant could not attempt to circumvent this limitation on the government's *respondeat superior* liability by alleging that the government was negligent in its supervision of the employee in question. But if Congress meant to bar claims based on the intentional torts of government employees acting within the scope of their duties, it could not possibly have intended that the government be responsible for intentional torts committed by employees who were acting outside the scope of their duties and were therefore even less subject to the government's supervision and control.[3] Justice (then Judge) Harlan explained that a purpose of Section 2680(h) is to exempt the government from liability for "activities which practically, even though not legally, speaking are outside the scope of a government employee's proper official functions" (*Panella* v. *United States*, 216 F.2d 622, 625 (2d Cir. 1954)); *a fortiori*, the government should not be held responsible for acts like Heard's that are without question wholly outside the scope of the tortfeasor's duty and have no connection whatever to his government service.

Indeed, the court of appeals' decision imposes on the government a novel form of liability that is unknown at common law—a result that Congress could not have intended when it enacted the FTCA. At common law, if an employee is acting outside the scope of his authority, the employer has no general duty to exercise reasonable care to prevent the employee from injuring

[3] There is no suggestion in this case that Heard was acting within the scope of his authority.

others. See Restatement (Second) of Torts §§ 315, 317 (1965).[4] This is true even if the employer knows of the employee's dangerous proclivities (see Restatement (Second) of Torts § 314 (1965)[5]) and even if the employer is fully able to control the employee's off-duty activities. See, *e.g.*, Restatement (Second) of Torts § 317 comment *b* ("[A] factory owner * * * is not required * * * to exercise any control over the actions of his employees while on the public streets or in a neigh-

[4] Section 315 provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Section 317, which describes the extent to which such a "special relation" exists between an employer and an off-duty employee who harms another, provides that "[a] master is under a duty to exercise reasonable care * * * to control his servant while acting outside the scope of his employment * * * if * * * the servant * * * is upon the [master's] premises * * * or [premises] * * * the servant is privileged to enter only as his servant, or * * * is using a chattel of the master * * *." There is no allegation that Heard was on government premises or was using a chattel belonging to the government when he killed Shearer, and the court of appeals' decision accordingly is not limited to cases in which, for example, a serviceman uses his service weapon to commit a tort. In any event, since Section 2680(h) would exempt the government from liability if a service weapon were used to commit an intentional tort by a serviceman who was *on* duty, and acting within the scope of his employment, Congress could not have intended that the government be held liable for the tortious off-duty use of such a weapon.

[5] Section 314 provides:

> The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

boring restaurant during the lunch interval, even though the fact that they are his servants may give him the power to control their actions by threatening to dismiss them from his employment if they persist."); Prosser, *Torts* 275 (4th ed. 1971) ("It must be remembered that the mere fact that misconduct on the part of another might be foreseen is not of itself sufficient to place the responsibility upon the defendant.").

At common law, therefore, a private employer of Heard would not be liable in the circumstances alleged in respondent's complaint. There is no reason whatever to believe that Congress intended to subject the government to such a wholly novel form of liability. To the contrary, it is clear from the language of the Act itself that the government's liability under the FTCA is to be no broader than that of a private party in similar circumstances (see 28 U.S.C. 1346(b) and 2674). Moreover, an authoritative source on the meaning of the FTCA (see *Kosak*, slip op. 8-9) explained to Congress that the "theory" of the intentional tort exception "is that, since this bill is a radical innovation, perhaps we had better take it step by step." *Tort Claims: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 22 (1940) (statement of Alexander Holtzoff). Since, as this statement shows, the intentional tort exception was designed to exempt the government even from certain well-established forms of liability to which private parties are subject, Congress could not have intended to subject the government to a form of liability unknown at common law.[6]

[6] Where the government undertakes the responsibility of supervising a person known to be dangerous—such as by operating a prison, school, or hospital for dangerous persons—several cases have held that it will be liable if its agents fail to discharge that responsibility with due care. See, *e.g.*, *Muniz* v. *United States*, 305 F.2d 285 (2d Cir. 1962), aff'd, 374 U.S. 150 (1963) (prisoner); *Panella* v. *United States*, *supra* (inmate at public health service hospital). See also Restatement (Second) of Torts § 319 (1965):

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

There is, however, no suggestion in this case that the government had "take[n] charge" of Heard in this sense or otherwise assumed any special responsibility for protecting others from him (see App., *infra*, 21a (Garth, J., dissennting)); the military, unlike a prison or a psychiatric ward, is not an institution established to supervise persons known to be dangerous.

The court of appeals relied (App., *infra*, 8a-9a) on a decision in this line of cases, *Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972). But as Judge Garth pointed out in dissent (App., *infra*, 19a-21a), the court in *Gibson* carefully explained that it was not imposing on the government a general duty to supervise all those whose behavior it might be able to influence (see 457 F.2d at 1394).

2. The court of appeals also erred in reversing the district court's holding that the *Feres* doctrine bars respondent's claim. *Feres* established that the FTCA does not waive the government's sovereign immunity from suits by servicemen for alleged torts that are incident to military service. This Court has explained that the *Feres* doctrine is principally based on the following considerations:

> [T]he "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty...."

United States v. *Muniz*, 374 U.S. 150, 162 (1963), quoting *United States* v. *Brown*, 348 U.S. 110, 112 (1954). See *Chappell* v. *Wallace*, No. 82-167 (June 13, 1983), slip op. 3. The Court has also explained that the

purpose of the *Feres* doctrine is to avoid a trial at which courts must engage in "second-guessing military orders" and at which the "issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety." *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977).

The court of appeals' decision is inconsistent with each of these objectives of the *Feres* doctrine. Respondent's claim, which is made on behalf of a serviceman,[7] directly challenges several military orders. Specifically, respondent alleges that Shearer's superiors at Fort Bliss and elsewhere in the Army injured him because they: (i) "negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard," (ii) failed to "take any action to prevent [Heard] from endangering other persons," (iii) "failed to warn other persons that [Heard] was at large, and of the danger which he presented[,]" and (iv) "negligently and carelessly failed to then remove Andrew Heard from active military duty" (C.A. App. 17a-18a). Respondent thus seeks to have the courts inquire into basic decisions about the discipline, control, and discharge of Heard and into whether Shearer's superior officers exercised a sufficient degree of care in protecting him from another serviceman. These are principal examples of "'[t]he complex, subtle, and professional decisions as to the composition, training, * * * and control of a military force [that] are essentially professional military judgments'" (*Chappell*, slip op. 6, quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)) and that should not be second-guessed by a court at the behest of a serviceman.

[7] It is immaterial that the suit was brought not by the serviceman but by a party claiming on his behalf; *Feres* itself was a suit by the executrix of the injured serviceman (see 340 U.S. at 136-137). See also App., *infra*, 25a n.1.

The court of appeals ruled that respondent's claim was not barred by *Feres* because Shearer was off the base and on personal business at the time he was murdered. See App., *infra*, 5a-7a. But the location of the murder committed by Heard and Shearer's off-duty status at the time are immaterial, because respondent cannot establish her claim simply by showing that Heard's actions were tortious. Rather, respondent seeks to demonstrate that Shearer's superior officers committed a tort against him by failing to give him adequate warnings about a dangerous fellow serviceman and by failing to ensure that that serviceman was discharged. These actions and decisions of Shearer's superior officers were clearly "incident to [Shearer's] service" (*Feres*, 340 U.S. at 146); according to respondent, they constitute a breach of a duty that Shearer's superior officers owed to their subordinates. As the district court explained (App., *infra*, 26a), it is of no significance that the asserted consequence of the military decisions that allegedly constituted a breach of this duty did not befall Shearer until he happened to be off base and off duty.[8]

[8] The court of appeals' decision on the *Feres* issue cannot be reconciled with *Brown* v. *United States*, No. 83-1234 (8th Cir. July 20, 1984). The plaintiff in *Brown* sued on behalf of a member of the National Guard, Briscoe, who was allegedly the victim of a racially motivated intentional tort committed by other members of the Guard. The incident occurred at a party on the military base where all the servicemen were stationed, but all the servicemen were off duty at the time. The plaintiff alleged, among other things, that superior officers negligently failed to prevent the incident and failed to perform an adequate investigation.

The court of appeals held (slip op. 13-14) that these claims were barred by *Feres*:

> The claim that various officers negligently failed to prevent the incident directly calls into question the disciplinary decisions of Briscoe's superior officers. Presumably what would be litigated is whether the officers should have issued some type of order, or otherwise taken disciplinary

The court of appeals relied (App., *infra*, 5a-7a) on *Brooks* v. *United States*, 337 U.S. 49 (1949), which held that an off-duty serviceman can sue under the FTCA for injuries sustained in an off-base automobile accident with a military vehicle. But in *Brooks*, the duty breached by the driver was not a duty owed to the plaintiff because he was a serviceman (see 337 U.S. at 52), but a duty owed equally to all members of the general public.[9] The suit therefore would not have required

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action, to prevent any type of racially motivated actions. Under the *Feres* doctrine such a lawsuit cannot be maintained—it strikes precisely at the type of command relationship between a service member and his or her superior officers that is at the heart of the military disciplinary structure. Similarly, the claim that various officers failed to perform a proper investigation strikes directly at military decisionmaking with respect to a disciplinary matter. The *Feres* doctrine will not permit a court to second-guess the military decisions as to how an investigation into a disciplinary matter should have been conducted.

The court of appeals did not consider it decisive that the injury in *Brown*, unlike the injury to Shearer, was inflicted on a military base. See slip op. 10-11. Other circuits have similarly applied *Feres* to preclude claims for injuries that occurred while the serviceman was off the base. See, *e.g.*, *Johnson* v. *United States*, 631 F.2d 34, 37 (5th Cir. 1980), cert. denied, 451 U.S. 1018 (1981) (*Feres* bars a claim for injury that occurred when serviceman was off duty and off base because "all the government actions that resulted in [the serviceman's] death were directly and substantially related to his military service."). It also was not significant that Briscoe was a member of the National Guard (see slip op. 7). Accordingly, it appears that the Eighth Circuit would have held that respondent's claim was precluded by *Feres*.

[9] Here, as we have noted, respondent appears to have alleged only a breach of duties owed to Shearer by virtue of his status as a serviceman, and in any event it is clear—as the courts of appeals ruled in *Naisbitt* v. *United States*, *supra*, and *United States* v. *Shively*, *supra*—that respondent's claim cannot be based upon a breach of a duty owed to the public at large.

courts to second-guess a military decision about the degree of care to be shown to a serviceman.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1089

SHEARER, LOUISE, IND. AND AS ADMINISTRATRIX OF THE ESTATE OF SHEARER, VERNON, DECEASED, APPELLANT

v.

UNITED STATES OF AMERICA
C/O PETER F. VAIRA, U.S. ATTORNEY, APPELLEE

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
D.C. Civil No. 82-0082

Argued: October 24, 1983
Before: GIBBONS, GARTH AND HIGGINBOTHAM,
Circuit Judges
(Filed: December 19, 1983)

OPINION OF THE COURT

HIGGINBOTHAM, A. LEON, JR., *Circuit Judge*

Once again, we are asked to decide the rights of a serviceman who, while on authorized leave and off base, suffered a fatal injury because of, *inter alia*, the alleged negligence of persons within the command hierarchy of the United States Army ("Army"). We are

confronted with the traditional defenses of the *Feres*[1] doctrine and a claim of the inapplicability of the Federal Tort Claims Act.

Plaintiff-appellant Louise Shearer brought this action against defendant-appellee, the United States, under the Federal Torts Claim Act ("FTCA"), 28 U.S.C. Sections 1346(b), 2671-2680, claiming that the negligence of the Army caused the murder of her son Private Vernon Shearer. Relying on the *Feres* doctrine, the district court granted the government's motion for summary judgment. Appellant challenges the district court's decision presenting two issues for consideration on this appeal: whether either the *Feres* doctrine or the intentional tort exception to the FTCA bars appellant's action.

We hold that neither the *Feres* doctrine nor the intentional tort exception to the FTCA bars appellant's claim. We therefore will reverse the district court's order granting summary judgment to the United States and will remand this case to the district court.

I.

For the purposes of this appeal, we must accept as true the following facts pleaded by appellant—the party against whom summary judgment has been ordered: the decedent, Vernon Shearer, was an eighteen-year old private in the Army stationed at Fort Bliss, Texas. Having been in the Army barely four months, on June 2, 1979, while off the military reservation on an

[1] *Feres* v. *U.S.*, 340 U.S. 135 (1950). The *Feres* doctrine has been subjected to severe criticism by some commentators. *See* Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law, 55 N.Y.U.L.Rev. 601, 629-35. 631 n.173 (1980); Note, From *Feres* to *Stencel*: Should Military Personnel Have Access to FTCA Recovery? 77 Mich.L.Rev. 1099, 1102-21 (1979). Nonetheless, the Supreme Court has indicated no desire to reconsider this judicially created doctrine.

authorized leave from his unit, Shearer was "kidnapped at point of gun and shot to death" in New Mexico by Private Andrew Heard. Heard was also off-duty.[2] Three years before, while stationed in Germany, Heard also had been prosecuted for what was alleged to be a gruesome murder of a German woman. The indictment alleged that he had "inflicted serious head injuries on the 38-year-old Margarete Hess on the occasion of sexual actions by means of a wrench and a lifting jack." Appendix ("App.") at 13a. Heard served three years of a four year sentence in Germany. His attack on Shearer occurred less than four months after his release from prison for the murder of Margarete Hess.

At the time of the kidnapping and murder of Shearer, the Army was well aware of Heard's record of violence, but had disregarded three of Heard's superiors who recommended that "Heard be eliminated from the Service under Chapter 14, Army Regulations 635-200." App. at 14a. His Battalion Commander in Germany, Lieutenant Colonel Rayburn C. Storvall, on December 7, 1978 had declared that "Private Heard is unsuitable for military service as his record discloses." *Id.* at 15a. That same day Lieutenant Colonel Storvall's recommendation was adopted by two other superiors of Heard, Colonel Donald E. Eckelbarger and Brigadier General Charles E. Canidy. Indeed, once Colonel Eckelbarger wrote that Heard's discharge "would be in the best interest of Private Heard and the United States Army." *Id.*

Despite the precise and unequivocal recommendations, the Army failed to make a "final determination" on Heard's discharge. More important, not until after Heard had murdered Shearer did the Army even bother to conduct a mental evaluation of Heard. *Id.*

[2] In a separate action Heard pleaded *nolo contendere* to the crime of "second degree murder and firearm enhancement." Appendix ("App.") at 16a.

Appellant argued that the Army was negligent in failing to discharge Heard from the Army, in failing to warn other enlisted personnel of Heard's violent propensities, and in failing to restrict Heard. Appellant's arguments concluded that the Army's failure in these regards proximately caused Shearer's death.

The United States responded to appellant's allegations by moving to dismiss Shearer's complaint on two grounds: Shearer's injury was "incident to military service" and therefore barred under the *Feres* doctrine. In the alternative, the United States argued that appellant's claim was one "arising out of assault and battery" and thus barred by the intentional tort exception of the FTCA.

The district court granted the United States' motion for summary judgment based on the *Feres* doctrine. The court did not decide the issue of the intentional tort exception to the FTCA.

II.

The FTCA permits suits against the United States for the "negligent or wrongful act" of a government employee. 28 U.S.C. § 1346, 2674. The scope of the FTCA, as it applies to the military, has been narrowed in a series of decisions which together comprise the *Feres* doctrine. The thrust of the *Feres* doctrine prevents an action against the government for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *U.S.* v. *Brown*, 348 U.S. 110, 112 (1954); *Feres* v. *U.S.*, 340 U.S. 135, 146 (1950); *Jaffee* v. *U.S.*, 663 F.2d 1226, 1227 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982); *See Brooks* v. *U.S.*, 337 U.S. 49, 52 (1949).

The principle underlying this judicially created exemption is that the FTCA mandates minimum judicial interference with the "peculiar and special relationship of the soldier to his superiors. . . ." *Stencel Aero Engineering Corp.* v. *U.S.*, 431 U.S. 666, 671 (1977); *U.S.*

v. *Brown*, 348 U.S. at 112. Accordingly, *Feres* insulates the military from FTCA suits arising out of "negligent orders given or negligent acts committed in the course of" an injured serviceman's military duty. *Stencel Aero Engineering Corp.* v. *U.S.*, 431 U.S. at 671; *U.S.* v. *Brown*, 348 U.S. at 112. The pivotal question under the *Feres* analysis is whether the serviceman sustained the injury either in the "course of" or "incident to" his military service. *U.S.* v. *Brown*, 348 U.S. at 112; *Feres* v. *U.S.*, 340 U.S. at 146; *Jaffee* v. *U.S.*, 663 F.2d at 1233.

These terms "in the course of" and "incident to," however, are not self-evident truths that leap out to illuminate any factual situation. Consequently, courts must probe beneath these conclusionary statements and must identify more specific facts to determine whether an injury or death was sustained in the "course of" or "incident to" one's military service. Application of the doctrine focuses on the relationship between the serviceman and the military at the time and place the injury was sustained. The status and activity of the injured serviceman often seem to be the controlling factors.

The important distinguishing factors accounting for the different outcomes in these two cases: the status of the injured soldier at the time of injury, the place of the injury, and the nature of the activity engaged in, and whether the injured party was acting under orders or compulsion. These factors control *Feres* doctrine cases. *U.S.* v. *Brown*, 348 U.S. at 112; *Feres* v. *U.S.*, 340 U.S. at 146; *Jaffee* v. *U.S.*, 663 F.2d at 1232. *See Parker* v. *U.S.*, 611 F.2d 1007, 1013-15 (5th Cir. 1980); *Woodside* v. *U.S.*, 606 F.2d 134, 138-42 (6th Cir. 1979), *cert. denied*, 445 U.S. 904 (1980); *Harten* v. *Coons*, 502 F.2d 1363, 1365 (10th Cir. 1974), *cert. denied*, 420 U.S. 977 (1975).

Generally, an off-duty serviceman not on the military base and not engaged in military activity at the time of

injury, can recover under FTCA; an on-duty serviceman, however, is usually barred from recovery. In *Brooks*, an off-duty serviceman hit by a military vehicle while he was engaged in personal business recovered under FTCA. *U.S.* v. *Brooks*, 337 U.S. at 50-52. In *Feres*, on the other hand, an on-duty serviceman killed in an on-base fire was barred from recovery. *Feres* v. *U.S.*, 340 U.S. at 136-38, 146.

In this case, appellant argues that the district court improperly applied the *Feres* doctrine to their claim. Specifically, they argue that the court neglected to focus on Shearer's activity and status at the time and place of his injury. On review, the record indicates that Shearer was not engaged in or acting incident to any military activity at the time of his murder. To the contrary, Shearer was on leave in another state (New Mexico) when he was kidnapped. The United States does not dispute that Shearer was on authorized leave and off the base at the time of his murder.

The district court's error stems from its singular focus on the status and activity of the allegedly negligent parties (i.e. Heard's superior officers) without considering the status and activity of the injured party. Consequently, the district court improperly concluded that appellant's "allegations relate directly to decisions of military personnel made in the course of the performance of their military duty, and therefore are barred." App. at 25a.

In support of its conclusion, the district court erroneously relied on *Johnson* v. *U.S.*, 631 F.2d 34, 36-37 (5th Cir. 1980) and *Henning* v. *U.S.*, 446 F.2d 774, 777 (3d Cir. 1971). These two cases did not adopt a tortfeaser status-activity analysis as the lower court suggested. Instead these cases merely restated a basic *Feres* doctrine rule. Malpractice to an active duty soldier in an army hospital is, by its very nature, considered activity "incident to military service," and therefore barred under *Feres*.[3] Both *Johnson* and *Henning* concerned injuries to servicemen allegedly stemming from their medical treatment in Army hospitals. Although receiving medical treatment in military hospitals may be considered an activity and benefit "incident to military service" and therefore barred under *Feres*, certainly *being kidnapped* off base at gun point can never be perceived as one of the activities or anticipated free benefits of being in the armed services. Thus, there is no legitimate basis on which *Feres* can bar appellant's claim.

For these reasons, we reverse the district court on this issue.

III.

The United States offers a separate ground, the intentional tort exception to the FTCA, as an independent basis to uphold the district court's summary judgment. The FTCA does not provide recovery for the intentional tort of assault and battery. Section 2680(h) of the Act carves out an intentional tort exception: "The provisions of this chapter and Section 1346(b) shall not apply to ... (h) [a]ny claim arising out of assault [and] battery...." 28 U.S.C. § 2680(h).

The United Sates argues that appellant's wrongful death claim falls within the intentional tort exception because it "arises out of" the assault and battery committed by Heard. Appellant disagrees, arguing instead that this action "arises out of" military negligence which proximately caused Shearer's death.

The FTCA does not necessarily bar a cause of action in negligence, even if the injury is directly caused by the assault and battery of a government employee. The FTCA simply requires that the intentional tort must

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[3] *See Feres* two companion cases, *Jefferson* v. *U.S.*, 340 U.S. 135 (1950) and *U.S.* v. *Griggs*, 340 U.S. 135 (1950); *See Harten* v. *Coons*, 502 F.2d at 1365 n.6; *Lowe* v. *U.S.*, 440 F.2d 452-53 (5th Cir. 1971).

"have its roots in government negligence," *Gibson* v. *U.S.*, 457 F.2d 1391, 1395-97 (3d Cir. 1972); *Underwood* v. *U.S.*, 356 F.2d 92, 99-100 (5th Cir. 1966). Recovery under this exception could thus be barred if the negligence was a remote cause of the injury, or if the plaintiff, through artful pleadings with conclusionary allegations, attempts to create a negligence issue. *Gibson* v. *U.S.*, 457 F.2d at 1395-96. *See also Hughes* v. *Sullivan*, 514 F. Supp. 667, 669-70 (E.D. Va. 1980), *aff'd sub nom.*, *Hughes* v. *U.S.*, 662 F.2d 219, 220 (4th Cir. 1981); *Naisbitt* v. *U.S.*, 611 F.2d 1350, 1354-55 (10th Cir. 1980); *U.S.* v. *Shively*, 345 F.2d 294, 296-97 (5th Cir. 1965).

In order to withstand dismissal of a suit under the intentional tort exception to the FTCA, a plaintiff must allege sufficient facts which, if proven, would demonstrate that the government should have reasonably anticipated that one of their employees would commit an intentional tort. *U.S.* v. *Shively*, 345 F.2d at 296. For example, if an assault and battery occurred as a "natural result" of the government's failure to exercise due care, the assault and battery may be deemed to have its roots in negligence and therefore it is within the scope of the FTCA. *Id.*; *Gibson* v. *U.S.*, 457 F.2d at 1395-96.

In bringing a claim, however, a plaintiff cannot merely point to an assault and battery and then claim, based simply on the occurrence of the intentional tort, that the government was negligent for not having had anticipated the offensive action. *See Naisbitt* v. *U.S.*, 611 F.2d at 1356; *Gibson* v. *U.S.*, 457 F.2d at 1395-96. The plaintiff must allege sufficient independent facts to demonstrate that the government knew or should have known that the employee was dangerous prior to the injurious act. *Gibson* v. *U.S.*, 457 f.2d at 1395-96; *Underwood* v. *U.S.*, 356 F.2d at 99-100.

In *Gibson* v. *U.S.*, *supra*, 457 F.2d at 1395, a government employee assaulted another employee. The

district court's summary judgment order dismissing plaintiff's FTCA claim, was reversed on appeal. The court of appeals held that the intentional tort exception to the FTCA did not necessarily bar a negligence action against the government, even if the immediate cause of plaintiff's injury was an assault and battery. It reasoned that because the government knew that the assailants' class of employees were "dangerously sick," and because the government "failed to take reasonable measures" to insure plaintiff's safety, "[t]he attack ... was a foreseeable consequence of the government's failure to exercise due care... [I]t is not such an intervening act as will sever the necessary casual relation between the negligence and the appellant's injuries." *Gibson* v. *U.S.*, 356 F.2d at 99-100.

Similarly, in this case, appellant alleges specific facts indicating government knowledge of Heard's violent propensities. The following facts are critical: Heard had been convicted and imprisoned for killing a civilian while in the Army. He was released from the prison less than four months prior to killing Shearer. Several months before Shearer was murdered, high-ranking military officers, aware of Heard's violent disposition, recommended his discharge. Nevertheless, Heard remained in the Army and was treated as a member in good standing. Despite Heard's previous murder and the Army's knowledge of his disposition, enlisted men, including Shearer, were not warned about his violent past or present disposition. We believe these alleged facts are sufficient to withstand a summary judgment motion based on the intentional tort exception to the FTCA.

The United States relies on *Naisbitt* v. *U.S.*, 611 F.2d 1350 (10th Cir. 1980), to support its motion to dismiss under the intentional tort exception. This reliance is misplaced.

Naisbitt concerned the dismissal of a suit under the intentional tort exception to the FTCA where the alleged negligence was based on mere conclusionary allegations. There, two off-duty air force servicemen committed a number of rapes and murders, but the plaintiff's complaint failed to assert any facts suggesting that the government knew or should have known either of the prior violent actions by the assailants or of the assailant's potential violence. *Naisbitt* v. *U.S.*, 611 F.2d at 1356; *Naisbitt* v. *U.S.*, 469 F. Supp. 421, 422-23 (D. Utah 1979).

In this case, appellant's allegations, if proven, would permit a court to find that the government's negligence proximately caused Shearer's injury, thus, this case falls closer to the rubric of *Gibson* facts, not to that of *Naisbitt*. We therefore reject the United States' contention that summary judgment was justified under Section 2860(h), the intentional tort exception.

We will therefore reverse the judgement of dismissal of the district court and remand this case for further proceedings consistent with this opinion.

GARTH, J., *dissenting:*

The majority holds that neither *Feres* v. *United States*, 340 U.S. 135 (1950), nor the intentional torts exception to the Federal Tort Claims Act [FTCA], 28 U.S.C. § 2680(h) (1976), bars Shearer's cause of action. I cannot agree that Shearer has stated a cause of action that is not barred by *Feres* and by section 2680(h), and which would require a trial. Thus, I dissent from the majority's holding to that effect.

I.

Under the majority's analysis, for Shearer to recover in the face of *Feres* and section 2680(h), it must be demonstrated that her cause of action sounds in negligence, because a showing of negligence is required under

Feres and the FTCA, as a predicate to recovery. In my opinion, the circumstances of Shearer's case, however analyzed, cannot surmount the *Feres* hurdle.[1] However, even if *Feres* were not to bar Shearer's action as I believe it unquestionably does, Shearer still cannot escape the provision of the FTCA that bars claims arising out of an intentional tort—in this case, an assault and battery. *See* 28 U.S.C. § 2680(h).

Her complaint, although appearing on the surface to charge negligence is, in truth, no more than a complaint seeking monetary recovery for an assault and battery perpetrated by a fellow soldier upon her son. Congress, however, has refused to permit recovery against the Government for such intentional actions. It is for this reason that plaintiffs like Mrs. Shearer, with claims that are otherwise barred, have sought to overcome the

[1] While I agree that the courts that have employed a *Feres* analysis have reached results that do not always appear logical or consistent, it is not necessary for me to address *Feres* in the circumstances here presented. As my subsequent discussion reveals, I do not believe any bona fide negligence claim has been framed by Shearer, nor do I believe that the decision respecting Heard's discharge can be characterized as other than a military decision committed to the command function of the Army. I note, moreover, that the Government has relied heavily on *Henning* v. *United States*, 446 F.2d 774 (3d Cir. 1971), a case decided by this court, which held that the proper inquiry to be made when negligence is alleged is an inquiry directed to the time and place of the alleged negligence. In this case, the time and place of the alleged negligence was some months prior to Shearer's induction in the Army and took place in Germany. *See* note 5 *supra*. The majority opinion apparently does not recognize this doctrine, for rather than giving it effect, the opinion addresses the time and place that the injury was *sustained*. *See* Maj. Op. Typescript at 6, 8. However, any further discussion of *Feres* v. *United States*, 340 U.S. 135 (1950), would be meaningless because, as noted, the FTCA requires a legitimate cause of action sounding in negligence in order to recover against the Government. I therefore limit my discussion to section 2680(h).

obstacle of *Feres* and 2680(h), by framing their complaints in terms of the Government's alleged breach of duty, rather than in the substantively correct terms of an intentional tort. They have done so in order to provide the necessary predicate of a negligence cause of action.

Even a cursory review of recent case law involving the issue presented here, reveals that "negligence" claims such as Shearer asserts have been filed with greater and greater frequency. *See, e.g.*, cases collected in *Lambertson* v. *United States*, 528 F.2d 441, 444 (2d Cir. 1976); *see also Wine* v. *United States*, 705 F.2d 366, 366-67 (10th Cir. 1983); *Hughes* v. *Sullivan*, 662 F.2d 219 (4th Cir. 1981), *aff'g* 514 F. Supp. 667, 669-70 (E.D. Va. 1980); *Naisbitt* v. *United States*, 611 F.2d 1350, 1353-56 (10th Cir. 1980), *cert. denied* 449 U.S. 885 (1980); *Taylor* v. *United States*, 513 F. Supp. 647 (D.S.C. 1981); *Davidson* v. *Kane*, 337 F. Supp. 922, 923 (E.D. Va. 1972); *United States* v. *Shively*, 345 F.2d 294, 296-97 (5th Cir. 965). A pattern has apparently developed by which the true nature (intentional tort) of a claimant's cause of action against the Government is subordinated to a purported cause of action sounding in negligence. The effort in these cases is an obvious attempt to escape the consequences of the Supreme Court's decision in *Feres* and Congress' determination to limit the Government's tort liability. *See* 28 U.S.C. § 22680. Prior to today, this court has yet to confront this problem directly, although we have approached the issue tangentially in *Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972), which I discuss in this dissent.

Because I believe (1) that it is important to implement the legislative command of Congress and to thus put this issue to rest once and for all (*compare Bryson* v. *United States*, 463 F. Supp. 908 (E.D. Pa. 1978) *with Collins* v. *United States*, 259 F. Supp. 363 (E.D. Pa. 1966), and (2) because I believe that the majority's analysis is incompatible with the better-reasoned analyses of other Courts of Appeals, *see* typescript at 7-11, *infra*, thereby leading to still another conflict among these Courts, and (3) because I believe that the constantly recurring claims under *Feres* and the FTCA require some degree of jurisprudential consistency in this court, to say nothing of consistency with decisions of other Courts of Appeal, I find it necessary to dissent.

II.

Section 2680(h) of Title 28 provides that the provisions of the FTCA shall not apply to "any claim *arising out* of assault, battery, * * *." (Emphasis added). Because the Government has not consented to be sued for such a tort, a federal court is therefore without jurisdiction to entertain any suit which arises out of an assault and battery. Thus, if the claim being pressed by Shearer sounds not in negligence but in assault and battery, then it unquestionably must be barred by this statutory exception to federal liability under the FTCA.

Mrs. Shearer, of course, stresses that her cause of action is not concerned with the attack upon her son by Heard, an attack that resulted in her son's death. Rather she claims that her cause of action is focused upon the negligence of the Government in not discharging Heard or otherwise supervising him adequately.[2] The Government responds, however, that the negligence claim is just a cloak for what is really an assault and battery claim at heart. Because I believe that real-

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[2] At oral argument, Shearer's counsel limited the grounds of alleged negligence to these two aspects, even though Shearer's Proposed Amended Complaint charges in paragraph 41 that "[t]he United States Government ... failed to warn other persons that he [Heard] was at large, and of the danger which he presented." App. 17a.

istically, logically, and precedentially, the Government's characterization and understanding of Shearer's cause of action is correct, I would find Mrs. Shearer's claim to be barred by section 2680(h).

A.

By far the greater number of courts that have dealt with claims similar to this one have found section 2680(h) to bar liability. In one of the first such cases, *Collins* v. *United States*, 259 F. Supp. 363 (E.D. Pa. 1966),[3] Judge Joseph S. Lord, III, said:

> It is true that the claim here is predicated on negligence. However, that negligence would have been without legal significance absent the alleged act of Brosz. Without that, there would have been no actionable negligence. It was the attack which served to attach legal consequences to defendant's alleged negligence. Congress could easily have excepted claims *for* assault. It did not; it used the broader language excepting claims *arising out of* assault. It is plain that the claim arose only because of the assault and battery, and equally plain that it is a claim arising out of the assult and battery. This being so, the United States has not waived its immunity as respects this claim.

Id. at 364. Other courts have reached the same conclusion when faced with a purported negligence claim that followed an intentional tort such as assault and battery. *See, e.g., Wine* v. *United States*, 705 F.2d 366, 366-67 (10th Cir. 1983); *Hughes* v. *Sullivan*, 662 F.2d 219 (4th

[3] In *Collins* v. *United States*, 259 F. Supp. 363 (E.D. Pa. 1963), a Post Office employee, "acting in the scope of his employment, 'pushed, hit and struck' the plaintiff." *Id.* at 364. The complaint alleged that the Government was negligent in hiring and retaining the employee "when it knew or should have known of his 'violent, vicious and malicious propensities.'" *Id.* The Government's motion to dismiss based on section 2680(h) was granted.

Cir. 1981), *aff'g* 514 F. Supp. 667, 669-70 (E.D. Va. 1980); *Naisbitt* v. *United States*, 611 F.2d 1350, 1353-56 (10th Cir. 1980), *cert. denied* 449 U.S. 885 (1980); *Taylor* v. *United States*, 513 F. Supp. 647 (D.S.C. 1981); *Davidson* v. *Kane*, 337 F. Supp. 922, 923 (E.D. Va. 1972). These cases remind us that, when we are called upon to decide whether the exception for intentional torts is applicable, we must look not to the theory that the plaintiff may have selected. Rather, "the decisive factor is whether, *in substance and essence*, the claim arises out of an assault and battery." *Nichols* v. *United States*, 236 F. Supp. 260, 263 (N.D. Miss. 1964), quoted in *Coffey* v. *United States*, 387 F. Supp. 539, 540 (D. Conn. 1975) (emphasis added).

An examination of the *Naisbitt* case from the Tenth Circuit and the *Hughes* case from the Fourth Circuit reveals what I believe to be the proper analysis and thus the proper disposition of a case such as the one before us.

In *Naisbitt*, *supra*, two off-duty members of the United States Air Force entered a privately-owned retail store in Ogden, Utah, and "committed a variety of atrocious acts including assault, rapes, batteries and murders against the plaintiffs and the plaintiffs' decedents. Five persons were shot and three were killed." 611 F.2d at 1351. The plaintiffs based their case on the theory that "the United States was guilty of actionable negligence in failing to supervise and curtail the two airmen in question in that it was reasonably foreseeable that they would, unless restrained, perpetrate serious injuries." *Id.* The district court granted the Government's motion to dismiss on the ground that the claim actually arose from assaults and batteries and was therefore barred by section 2680(h), the intentional tort exception. *See* 469 F. Supp. 421, 423 (D. Utah 1979). That court found that the negligence theory was "merely an alternative theory of liability." *Id.*

The Tenth Circuit affirmed the district court's holding, concluding that section 2680(h) barred the action then before it. After discussing the cases from other courts dealing with this problem, the Tenth Circuit stated:

> In summary: There is a strong thread running through most of these cases [and it] is that which recognizes the immunity of the government where the assailant is an employee of the government. This is applied regardless of whether the employee is on duty.... There is a dearth of authority allowing an action to be prosecuted against the government under the Tort Claims Act where the intervening assailant was an employee. In any case in which the employee has intentionally injured another, the tort asserted against the government, regardless of whether it is called negligence, is indeed an intentional tort attributable to the government.

611 F.2d at 1356.[4]

In *Hughes, supra*, a uniformed postal employee was arrested and charged with taking indecent sexual liberties with a twelve-year-old girl in between mail routes. He pleaded guilty to a lesser charge and was ordered to submit to psychiatric treatment. Shortly thereafter, the girl's father personally requested of the employee's supervisor that the perpetrator be relieved of his postal duties, but the request was denied and the

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[4] The Court went on to conclude:

> Finally, the particular facts of this case lead to the conclusion that the tort which is the basis of the lawsuit was intentional and subject to § 2680(h) because it was, as a matter of law, an intervening force of such great magnitude that it rendered the negligence of the government in failing to control the assailants insignificant in comparison. The character of the act is so predominantly intentional that the negligence as a causal force is virtually nonexistent.

611 F.2d at 1356.

employee resumed his duties. Several years later, the same employee, while on his route, lured two other young girls into his postal truck and took indecent sexual liberties with them. Their mother brought suit against the United States, claiming that the postal supervisor acted negligently in failing to relieve the employee of his delivery duties after the first incident. The district court dismissed the suits on the ground that the claims, although sounding in negligence, actually arose out of the assaults and batteries committed by the postal employee, and that they were therefore barred by the intentional tort exception found in section 2680(h).

The Fourth Circuit affirmed that decision "for reasons adequately stated by the district court." 662 F.2d at 220. The district court had analyzed similar cases from other courts and had chosen to follow the lead of the *Naisbitt* court, saying:

> The alleged negligence of the government employee in retaining [the perpetrator] Sullivan was not the proximate cause of the assault. The proximate cause of the assault is the wilful and intentional act of Sullivan.... The basis of the negligence is that of Sullivan, not of the postmaster in retaining Sullivan in the service. True, the [complaint] does allege that the United States had knowledge of indecent conduct on the part of Sullivan in 1974, but kept him in its employ, and refused a request of others to transfer Sullivan to another position; that the negligent keeping of him in his employment and the failure to transfer was the proximate cause of the assault. *But there would have been no assault except for the separate and independent acts of Sullivan. Without his independent assault, there would be no cause of action. It is to this action the statute does not waive immunity.*

Hughes, 514 F. Supp. 667, 670 (E.D. Va. 1980) (emphasis added).[5]

The majority opinion, in holding that 28 U.S.C. § 2680(h) does not bar shearer's claim, relies heavily on the Fifth Circuit case of *United States* v. *Shively*, 345 F.2d 294 (5th Cir. 1965). I find this citation and the majority's reliance upon it puzzling. In *Shively*, Sergeant Lancaster, who was off-duty and in civilian clothers, was negligently issued a pistol by the non-commissioned officer in charge of the Arms Room. The issuance of a weapon under such circumstances was prohibited by both Army regulations and Army custom, and held by both the district court and the court of appeals to be negligent. Lancaster proceeded to shoot his recently divorced wife and kill himself. The Court of Appeals for the Fifth Circuit held that: (1) the intervening assault by Lancaster on his ex-wife, and not the negligent issuance of the weapon to him, was the sole proximate cause of the injury, 345 F.2d at 297, and (2) the injured ex-wife's claim "is a 'claim arising out of assault,' which is, in those words, specifically excepted

[5] Indeed, there would have been no assault here except for the "separate and independent" act of Heard. Such an intervening act (here, the intentional assault and murder) has been held to be of such significance that even if the Army had initially been negligent, the subsequent act renders the negligence insignificant as a causal force. *See Naisbitt*, 611 F.2d at 1356; *United States* v. *Shively*, 345 F.2d 294, 296-97 (5th Cir. 1965). It should not go unmentioned that at the time that Heard was convicted and confined in Germany, leading to an Army officer's recommendation that he be discharged from the Service, Shearer had yet to join the Service. Shearer entered the Service on January 22, 1979 in Ft. Knox, Kentucky. Heard was released from Germany and transferred to the United States on February 3, 1979. Heard was not transferred to Ft. Bliss, Texas, until March 5, 1979. Shearer was not transferred to Ft. Bliss until May 5, 1979.

from recovery under the Federal Tort Claims Act, 28 U.S.C. § 2680(h)." *Id.*

Thus, *Shively* holds that, where the intervening act was the cause of the injury—as was the case here—even if negligence has been alleged, the claim, because it arises out of the shooting or assault, is excepted from recovery. Hence, *Naisbitt*, *Hughes*, and *Shively* are completely consistent in their analysis and holdings that section 2680(h) bars any recovery of damages for claims arising out of an intentional assault.

B.

The analysis in *Naisbitt*, *Hughes*, and *Shively* finds support in this court as well. In a case decided under a *Feres* analysis, Judge Rosenn, writing for our court, took great pains to distinguish the circumstances that occurred in *Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972), from the circumstances present in *Naisbitt* and *Hughes*. In so doing, he explained why the exception found in 28 U.S.C. § 2680(h) did not bar Gibson's recovery but would bar recovery by an individual such as Shearer who was the victim of an assault and battery.

Gibson had been hired by the Federal Electric Co. to train Job Corps enrollees at the Raritan Arsenal in New Jersey. On November 5, a Job Corps enrollee (Jessie, a juvenile delinquent with a known addiction to narcotics), while under the influence of narcotics and while employed by the United States, "plunged a screwdriver through the appellant's temple while the latter was engaged in the performance of his duties as a Job Corps leader and instructor." *Id.* at 1393. In addition, Gibson alleged that there had been other incidents at the Arsenal and that the supervising federal office was aware of the dangerous situation. This court held:

> First, the attack upon Gibson was a foreseeable consequence of the Government's failure to exercise due care *under the circumstances* and, there-

fore, it *is not such an intervening act as will sever the necessary causal relation between the negligence and the appellant's injuries.*

> Here, the very risk which constitutes the defendant's negligence is the probability of such action. It is clear that when such action occurs, it should not insulate the defendant's negligence under the causation formula. In other words, it is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm.

Id. at 1395 (footnote omitted). In distinguishing the *Gibson* situation from the *Collins* situation, Judge Rosenn wrote:

> [*Collins*] is the classic case of an intentional assault and battery except for the conclusory allegation that the Government knew or should have known the postal clerk had "malicious propensities." This conclusory statement, however, is based upon the very assault for which the action is brought. In this case, we are concerned with trainees who are drug addicts and have behavioral problems, under the care of the Government in a controlled environment and program designed to rehabilitate them. *The Government accepted the duty of caring for and controlling them knowing of their drug addiction and instability. It was obliged to exercise reasonable care to prevent them from harming others.*

Id. (emphasis added).[6]

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[6] *See also Loritts* v. *United States*, 489 F. Supp. 1030, 1031-32 (D. Mass. 1980) (rape of choral member on West Point campus by Government employee attributable to negligence of Government in not providing adequate protection for invited guest): *Bryson* v. *United States*, 463 F. Supp. 908, 912 (E.D. Pa. 1978) (alleged negligence of United States Army in failing to remove soldier which resulted in death of Army private at hands of fellow serviceman held to state a cause of action in negligence).

Neither *Loritts* nor *Bryson* affect the analysis which I advocate here. In *Loritts*, the district court expressly found that the Academy had voluntarily undertaken the task of providing escorts to the choral group, and having assumed that responsibility, its failure to carry out that obligation subjected the Government to liability. Indeed, the district court, acknowledging those cases which seek to circumvent section 2680(h) by artful pleading, addressed that very issue and found that such was not the situation in *Loritts'* case.

Similarly, *Bryson* is not persuasive because it failed to analyze the Government's section 2680(h) contention other than to refer to *Gibson* v. *United States*, 457 F.2d 1391 (3d Cir. 1972), in a non-analytic fashion and, indeed, in my opinion, to misread the critical distinction made in *Gibson* and referred to in text above. In addition, *Bryson* concentrated on *Feres* rather than on 28 U.S.C. § 2680(h) in permitting recovery against the Government. I believe that the *Feres* analysis in *Bryson* is as flawed as its conclusory holding with regard to section 2680(h).

Here the record disclosed that the circumstances surrounding Shearer's unfortunate death come well within the exception of section 2680(h), as that exception is explained in the *Gibson* opinion. Heard was not known to have a medical or behavioral problem such as an addiction to mind-controlling drugs. All that was known was that Heard had committed a single crime—albeit the serious crime of manslaughter—in Germany. He had been sentenced to and had already served a period of incarceration in Germany. Heard was not part of a Government rehabilitation program. The Government never accepted the duty to care for or control him in a "controlled environment" or "rehabilitation program." Therefore, the Government could not be found to have accepted any special obligation to exercise reasonable care with regard to preventing Heard from harming Shearer or anyone else. *See* note 5 *supra*.

Based on these critical factual distinctions, I find the rationale of *Naisbitt*, *Hughes*, *Shively* and *Gibson* (distinguishing *Collins*), as well as the other cases that proceed in a similar vein, to be exceedingly persuasive. The distresing event that gave rise to the chain of events culminating in this lawsuit was the heinous murder committed by Andrew Heard. For this crime Heard has been sentenced to prison for a term of fifteen to fifty-five years. I recognize that often the punishment received by a convicted criminal provides little solace or compensation to the victims of the crime. Yet, this unfortunate result still does not automatically convert what is essentially a cause of action for assault and battery into a cause of action for negligence against the perpetrator's employer.

I am aware that when the employer is the United States Government, that result is even more unfortunate because Congress has seen fit to limit the federal government's tort liability so as to completely exclude liability arising out of intentional torts which are committed by Government employees. *See* 28 U.S.C. § 2680(h) (1976). However, the merits of the exceptions to the Federal Tort Claims Act,[7] like the merits of the *Feres* doctrine, are not at issue before this court. What is before us is a cause of action framed in terms of negligence, which is, in my opinion, nothing more than a subterfuge for an intentional assault and battery claim that is barred as such under the FTCA. As Judge Van

[7] The statute, 28 U.S.C. § 2680 (1976), excepts claims arising in or out of (a) discretionary functions, (b) postal matters, (c) tax collections or customs duty, (d) certain suits in admiralty, (e) administration of Title 50, sections 1-31, (f) quarantine established by the government, (h) intentional torts (the exception that is relevent in this case), (i) operations of the Treasury, (j) wartime activities, (k) a foreign country, (l) the activities of the Tennessee Valley Authority, (m) the activities of the Panama Canal Company, and (n) certain Federal banks.

Graafeiland said, writing for the Second Circuit, in *Lambertson* v. *United States*, 528 F.2d 441, 444 (2d Cir. 1976), "[t]o say that plaintiff's claim was not one 'arising out of' a battery would be to blink at the exclusionary provisions of § 2680." After listing a collection of cases in which plaintiffs sought to avoid the intentional tort exclusions of section 2680(h) by claiming negligence, *id.*, Judge Van Graafeiland continued: "[T]o permit plaintiff to recover by 'dressing up the substance' of battery in the 'garments' of negligence would be to 'judicially admit at the back door that which has been legislatively turned away at the front door.'" *Id.* at 445, quoting *Laird* v. *Nelms*, 406 U.S. 797, 802 (1972).

Because I can discern no *bona fide* negligence claim on which Shearer predicated her cause of action, I have not addressed the *Feres* doctrine, *see* note 1 *supra*; and I would affirm the district court's judgment in favor of the Government on the ground that the exception to the FTCA, 29 U.S.C. § 2680(b), bars Shearer's action.[8]

Accordingly, I respectfully dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

[8] Because the district court ruled in favor of the Government on the *Feres* doctrine, holding that *Feres* barred Shearer's claim, it did not reach, and therefore did not address, the exception to the FTCA found in 28 U.S.C. § 2680(h), which would bar a claim arising out of an assault and battery.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 82-0082

LOUISE SHEARER, INDIVIDUALLY, AND AS
ADMINISTRATRIX OF THE ESTATE OF
VERNON SHEARER, DECEASED

v.

UNITED STATES OF AMERICA

DECEMBER 27, 1982

MEMORANDUM AND ORDER

HANNUM, J.

Presently before the Court in this civil action is Defendant's Motion for Summary Judgment. This case is brought pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.*

The facts relevant to defendant's motion are essentially undisputed. Plaintiff is the mother and administratrix of the estate of Vernon Shearer. Vernon Shearer was a private in the United States Army in June of 1978, stationed at Fort Bliss, Texas. On June 2, 1978, while Vernon Shearer was on authorized absence from Fort Bliss, he was shot and killed by another off-duty Army private, Andrew Heard. This incident took place off-base in Otero County, New Mexico.

On January 7, 1982, plaintiff filed suit in this Court alleging that the United States had been negligent in failing to exercise proper supervision and control over

Private Heard, and that this negligence had been the cause of decedent's being murdered. It was further alleged that Private Heard had been convicted of a previous homicide while in the Army in Germany and that, because of this fact, among others, the Army should have known of Private Heard's dangerous propensities and should have taken steps to prevent him from harming others.

Defendant states two bases in support of its motion for summary judgment: (1) Plaintiff's cause of action is barred by the *Feres* doctrine; (2) Plaintiff's cause of action is barred by the intentional tort exception to the Federal Tort Claims Act.

The so-called "*Feres* doctrine" emanated from the United States Supreme Court's holding in *Feres* v. *United States*, 340 U.S. 135 (1950):

> [T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

Id. at 146.[1] Relying on *Feres*, plaintiff argues that the "ultimate question" before this Court is "whether plaintiff's decedent, Vernon Shearer, was engaged in activity 'incident to his military service' at the time of his fa-

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[1] The *Feres* doctrine applies in cases in which a personal repesentative brings an action under a state death statute which is not derivative in nature, but is an original and distinct cause of action granted to such individuals to recover damages sustained by them by reason of the wrongful death of the decedent. *See Harten* v. *Coons*, 502 F.2d 1363, 1365 (10th Cir. 1974), *cert. denied*, 420 U.S. 963 (1974); *De Font* v. *United States*, 453 F.2d 1239 (1st Cir.1972); *cert. denied*, 407 U.S. 910 (1972); *Siglar* v. *LeVan*, 488 F. Supp. 185, 190 (D.Md.1980); *Brackin* v. *United States*, (E.D.Pa. No. 79-1368), Memorandum and Order of Hannum, J., July 20, 1979; *Harrison* v. *United States*, 479 F. Supp. 529 (D. Conn. 1979); *Martin* v. *United States*, 404 F. Supp. 1240 (E.D.Pa. 1975); *Van Sickel* v. *United States*, 178 F. Supp. 791 (S.D.Cal. 1959), *aff'd*, 285 F.2d 87 (9th Cir. 1960).

tal injury." Plaintiff asserts that her claim is not barred by the *Feres* doctrine because decedent was on authorized leave from his military base at the time of his death and, therefore, his death was not incident to military service.

This Court is not persuaded by plaintiff's argument. The ultimate question is not whether decedent was engaged in activity incident to military service when he incurred his injuries. Rather, the "focus ... is upon *when and how the negligent act occurs*" and whether the negligent act was a part of activity incident to service. *Henning* v. *United States*, 446 F.2d 774, 777 (3d Cir. 1971) (emphasis added), *cert. denied*, 404 U.S. 1016 (1972).[2]

Upon application of the *Henning* analysis, this Court finds that plaintiff's action is barred by the *Feres* doctrine. The negligence alleged by plaintiff relates to activity of the United States Army incident to military service. Plaintiff alleges that the Army was negligent in failing to exert reasonable control over decedent's assailant, Private Heard, despite the fact that it had knowledge of Heard's dangerous propensities. We find that these allegations relate directly to decisions of military personnel made in the course of the performance of their military duty and, therefore, are barred by *Feres*

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[2] The specific holding of *Henning* on this issue is as follows:

> This argument is erroneous for *Feres* does not limit its holding to injuries occurring in the course of activity incident to service. It also immunizes the Government for injuries arising out of activity incident to service. We think that *Feres* focuses not upon when the injury or when the claim becomes actionable, but rather the time of, and the circumstances surrounding the negligent act.... The focus is thus upon when and how the negligent act occurs.

Henning, 446 F.2d at 777.

and *Henning*.[3] *See Johnson* v. *United States*, 631 F.2d 34 (5th Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981).

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[3] The Third Circuit Court of Appeals recently explained the rationale underlying federal courts' refusal to scrutinize military decision-making in the context of an FTCA action:

> The primary rationale [for the *Feres* doctrine] was not advanced in Feres itself but in two subsequent decisions, *United States* v. *Brown*, 348 U.S. 110 (1954) and *United States* v. *Muniz*, 374 U.S. 150 (1963). Accordingly to these decisions, the immunity of the federal government from suit was "best explained" by
>
> > [t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits or discipline, and the extreme results that might obtain its suits under the Tort Claims Act were allowed for ... negligent acts committed in the course of military duty....
>
> *Brown*, 348 U.S. at 112. *Accord*, *Stencel Aero Engineering* v. *United States*, 431 U.S. at 671-72. Under this reasoning, suits for service injuries appear to have two consequences. The first is their effect on the willingness of military personnel to follow directions of their superiors. The Court in *Stencel*, a subsequent case based on *Feres*, observed that "the relationship between a sovereign and the members of its Armed Forces is unlike any relationship between private individuals." 431 U.S. at 670. Scrutinizing military decisions in civilian courts would "involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Id.* at 673. As we noted in *Jaffee* I:
>
> > If claims for injuries sustained by members of the armed forces in the execution of military orders were subjected to the scrutiny of courts of justice, then the civil courts would be required to examine and pass upon the propriety of military decisions. The security and common defense of the country would quickly disintegrate under such meddling. "[A]ctions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring suit against the United States."
>
> 592 F.2d at 717, *quoting Jefferson* v. *United States*, 178 F.2d 518, 519, 520 (4th Cir. 1949), *aff'd sub nom. Feres* v. *United States*, 340 U.S. 135 (1950).
>
> Suits for service injuries would also appear to have a related effect on the decision making of military authorities

Furthermore, the Court notes that its finding herein that *Feres* is a bar to plaintiff's claim does not leave plaintiff without remedy. A second basis of *Feres* is the existence of a no fault compensation scheme pursuant to the Veteran's Benefit Act. *Jaffee* v. *United States*, 663 F.2d 1226, 1235-38 (3d Cir. 1981), *cert. denied*, 102 S.Ct. 2234 (1982). The compensation scheme provided for in the Veteran's Benefit Act is the sole remedy for "service connected injuries." *Id. See Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977), in which the court held as follows:

> A compensation scheme such as the Veterans' Benefits Act serves a dual purpose: it not only provides a swift, eficient remedy for the injured serviceman, but it also clothes the Government in the "protective mantle of the Act's limiation-of-liability provisions." See *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106, 115 (1974). Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, see *Feres*, 340 U.S., at 142-143, the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries. To permit petitioner's claim would circumvent this limitation, thereby frustrating one of the essential

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> who give orders. Military decisionmakers might not be willing to act as quickly and forcefully as is necessary, especially during battlefield conditions, if they know they will subsequently called into a civilian court to answer for their actions. While the Tort Claims Act would not make them personally liable in these circumstances, the prospect of adversarial civilian scrutiny might inhibit the exercise of militry discretion.

Jaffee v. *United States*, 663 F.2d 1226, 1232 (3d Cir. 1981).

We find that allowance of this suit would involve the same "[s]crutinizing [of] military decisions in civilian courts" that *Jaffee* warns against. *Id.* Consideration of this case would involve "second-guessing miliary orders, and would ... require members of the Armed Services to testify in court as to each other's decisions and actions." *Id.*

> features of the Veterans' Benefits Act. As we stated in a somewhat diffefent context concerning the Tort Claims Act: "To permit [petitioner] to proceed ... here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe that the [Federal Tort Claim] Act permits such a result." *Laird* v. *Nelms*, 406 U.S. 797, 802 (1972).

See also, *Hatzlachh Supply Co., Inc.* v. *United States*, 444 U.S. 460, 464-65 (1980), in which the Court stated as follows:

> Recognizing that the Veterans' Benefits Act provided compensation to injured servicemen, which we understood Congress intended to be the sole remedy for service-connected injuries, we declined to construe the Tort Claims Act to permit third-party indemnity suits that in effect would expose the Government to greater liability than that contemplated under the statutory compensation scheme. In *Stencel*, Congress had provided a remedy, which we thought to be exclusive. Here, however, § 2680(c) denies a tort remedy for certain claims; and we fail to see how the *Stencel* holding that the existence of an exclusive statutory compensation remedy negates tort liability supports the conclusion that if the Tort Claims Act bars a tort remedy, neither is there a contractual remedy.

Because the decedent was on active duty with the Army at the time of his death, plaintiff is entitled to receive the Veterans Administration benefits. *See* Exhibit "A", Docket entry No. 12.[4]

Accordingly, summary judgment will be entered in favor of defendant and against plaintiff.

An Order follows.

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[4] Because we hold that *Feres* is a bar to plaintiff's claim, there is no need to address defendant's assertion that plaintiff's cause of action is barred by the intentional tort exception to the FTCA.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 82-0082

LOUISE SHEARER, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF
VERNON SHEARER, DECEASED

v.

UNITED STATES OF AMERICA

ORDER

AND NOW, this 27th day of December, 1982, upon consideration of defendant's Motion For Summary Judgment, and plaintiff's responses thereto, it is hereby ORDERED that defendant's Motion is GRANTED, plaintiff's Complaint is DISMISSED and judgment is entered thereon in favor of defendant and against plaintiff.

/s/ John B. Hannum

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1089

SHEARER, LOUISE, IND. AND AS ADMINISTRATRIX OF THE ESTATE OF SHEARER, VERNON, DECEASED

v.

UNITED STATES OF AMERICA C/O PETER F. VAIRA, U.S. ATTORNEY

LOUISE SHEARER, APPELLANT

ON APPEAL FROM
THE UNITED STATES DISRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil No. 82-0082)

Present: GIBBONS, GARTH and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel October 24, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 29, 1982, be, and the same is hereby reversed and the cause remanded to the

said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:

/S/ Sally Mrvos

SALLY MRVOS
Clerk

Dated: DECEMBER 19, 1983

Certified as a true copy and issued in lieu of a formal mandate on March 15, 1984.

TEST:

/S/ M. Elizabeth Ferguson

M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-1089

SHEARER, LOUISE, IND. AND AS ADMINISTRATRIX OF THE ESTATE OF SHEARER, VERNON, DECEASED, APPELLANT

v.

UNITED STATES OF AMERICA
C/O PETER F. VAIRA, U.S. ATTORNEY, APPELLEE

SUR PETITION FOR REHEARING IN BANC

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*.

The petition for rehearing filed by the United States of America, appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied. Judge Garth would grant the petition for rehearing for the reasons expressed in his panel dissent and in his statement that follows. Judge Adams would grant the petition for rehearing for the reasons expressed in his statement that follows. Judge Hunter and Judge Weis would grant the petition for rehearing.

BY THE COURT,

A. Leon Higginbotham, Jr.
Circuit Judge

Dated: MARCH 7, 1984

STATEMENT SUR DENIAL OF THE PETITION FOR REHEARING

GARTH, *Circuit Judge*

The petition for rehearing notes that the majority's disposition of the issue on this appeal can be expected to increase the number of suits brought against the United States, particularly since the majority's holding has erroneously construed the broad language of section 2680(h), 28 U.S.C. § 2680(h), the intentional tort exception to the Federal Tort Claims Act. Moreover, all of the other Courts of Appeals which have considered the issue presented here have held that 2680(h) bars recovery of claims similar to Shearer's, even if those claims are couched in terms of negligence. Indeed, a case (*United States* v. *Shively*, 345 F.2d 294 (5th Cir. 1965)) on which the panel majority relied to support its holding, i.e., that the exception does not pertain to Shearer, itself holds directly contrary to the panel's decision.

Shively holds expressly that Mrs. Shively, the victim (Sergeant Shively's recently divorced wife, whom the sergeant shot twice with a pistol before ending his own life), could not recover against the United States because her claim was a "claim arising out of assault" and thus was specifically excepted from recovery under 2680(h). *Id.* at 296-97. Additionally, *Shively* also concluded that the negligent issuance of a .45 caliber pistol by Army personnel to an off-duty sergeant in civilian clothes, in violation of Army regulations, was *not* the proximate cause of injury to Mrs. Shively, the sergeant's wife. Despite this explicit holding that 2680(h) barred any recovery from a claim arising out of an intentional assault, the panel majority was referred to *Shively* in a manner which can be read as supporting its holding. As I have pointed out, however, here and in the panel dissent, *Shively's* holding is completely contrary to the panel majority's decision in this case. Thus, if for no other reason than to clear up a potential jurisprudential murkiness that surrounds the panel majority's holding in this important area of claims made under the Federal Tort Claims Act, I believe this case should receive the attention of the court as a whole.

For these reasons as well as the other reasons expressed in the panel dissent, and because there is a need for uniform construction and application of a congressional policy that has been expressed so strongly by statutory mandate (28 U.S.C. § 2680(h)), I believe en banc consideration is merited.

Thus, I vote to grant the Government's petition for rehearing of this appeal.

Statement Sur Denial of Petition for Rehearing

ADAMS, *Circuit Judge*

In my mind, the majority opinion in this case decides two questions of exceptional importance that deserve *in banc* consideration. The panel's affirmative answer to the first question, whether the intentional tort exception to the Federal Torts Claims Act, 28 U.S.C. 2680(h), allows a claim against the government for a murder committed by an off-duty serviceman, brings this Court into conflict with the law of several other Circuits. *See, e.g., Wine* v. *United States*, 705 F.2d 366 (10th Cir. 1983); *Hughes* v. *United States*, 662 F.2d 219 (4th Cir. 1981). The panel's negative answer to the second question, whether the *Feres* doctrine precludes the kind of litigation that underlies this appeal, raises serious policy concerns about judicial review of military decisions. *See Feres* v. *United States*, 340 U.S. 135 (1980).

Because of the importance of the questions addressed on appeal and because of the tension that now exists among the circuits, I believe that reconsideration *in banc* would be both appropriate and salutary.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit